IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 09-0629

BARRY ALONZO HEATH,

Petitioner and Appellant,

v.

STATE OF MONTANA,

Respondent and Appellee.

BRIEF OF APPELLEE

On Appeal from the Montana Eighth Judicial District Court, Cascade County,
The Honorable Thomas M. McKittrick, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES (Cont.)

OTHER AUTHORITIES

STATEMENT OF THE ISSUES

1. Did the district court properly deny Petitioner's petition for postconviction relief?

2. Has the Petitioner shown that his postconviction relief attorneys provided ineffective assistance?

STATEMENT OF THE CASE

Barry Alonzo Heath (Heath) was found guilty in March 2002, by a jury, of Sexual Intercourse Without Consent and Tampering With a Witness. Heath appealed his convictions and sentence and this Court affirmed his convictions but remanded the case back to the district court for resentencing. In 2004, the district court resentenced Heath on the Sexual Intercourse Without Consent charge. He appealed this new sentence to this Court and his appeal was denied on November 8, 2005.

On February 7, 2007, Heath filed his original postconviction petition requesting a hearing because Heath's trial counsel, Steven Hudspeth (Hudspeth), refused to answer the allegations of ineffectiveness. (D.C. Doc. 1.) On February 15, 2007, the court ordered Hudspeth to respond, by affidavit, within 20 days, to the specific charges of ineffective assistance of counsel stated in Heath's petition. (D.C. Doc. 4.) On March 9, 2007, Heath filed a motion for a hearing and requested guidance from the court, indicating that prior to filing the court-ordered affidavit, Hudspeth took his

own life. (D.C. Doc. 5.) On May 2, 2007, the state filed its response to Heath's petition for postconviction relief. (D.C. Doc. 8.) On June 15, 2007, Heath filed his reply brief to the State's response to his petition. (D.C. Doc. 11.)

On February 8, 2008, the Honorable Thomas McKittrick (Judge McKittrick) issued his Order granting in part and denying in part Heath's petition for postconviction relief. (D.C. Doc. 12.) On February 19, 2008, Heath filed a notice of appeal. (D.C. Doc. 13.) This Court reversed and remanded for an evidentiary hearing. (D.C. 16-A, B.)

On April 16, 2009, an evidentiary hearing was held, post hearing briefs were filed, and on October 1, 2009, Judge McKittrick issued a 50-page order denying Heath's petition for postconviction relief. (D.C. Doc. 31, a copy of which is included as an appendix to Heath's brief.) On November 23, 2009, Heath filed a notice of appeal.

STATEMENT OF THE FACTS

The factual background for Heath's ineffective assistance claim is set forth in this Court's opinion in Heath's first postconviction appeal. (D.C. Doc. 16B.) In his brief, Heath claims that the district court's findings regarding the effectiveness of Hudspeth at his trial were clearly erroneous and its conclusions of law incorrect. In the order, Judge McKittrick cites the testimony and evidence at the hearing, as

well as significant portions of relevant testimony at trial, which shows that the reasons that Hudspeth did not perform a reenactment at trial, call certain witnesses on Heath's behalf, and investigate evidence was objectively reasonable and did not prejudice Heath.

Heath's argument that he was denied effective assistance from his postconviction relief attorneys David Avery (Avery) and Colin Stephens (Stephens) is without merit and not supported by the law. He claims that Avery and Stephens failed to call witnesses, obtain affidavits, and provide evidence in support of his case and requests that this Court reverse the district court's order denying postconviction relief, assign new counsel, and order a new hearing.

Additional facts will be discussed as necessary in the argument below.

The district court conducted a hearing and issued a detailed order outlining the issues raised by Heath in his postconviction petition. The district court denied Heath's petition for postconviction relief.

SUMMARY OF THE ARGUMENTS

After conducting a hearing, and reviewing the files and records of the case, the district court correctly concluded that Heath's petition for postconviction relief should be denied. The court determined that there is a strong presumption that counsel rendered adequate assistance and that Hudspeth's strategies and trial

tactics fell within a wide range of reasonable and sound professional decisions. The court further determined on some issues that Hudspeth's actions did not prejudice Heath or deprive him of a fair trial. The district court held that Heath did not show that there was a reasonable probability that, but for Hudspeth's alleged unprofessional errors, the result of the proceeding would have been different.

Since Heath has no constitutional right to counsel in a postconviction proceeding, no ineffective assistance of counsel claim can be raised regarding Avery's and Stephens' performances in his postconviction proceedings.

ARGUMENTS

I. THE DISTRICT COURT PROPERLY DENIED HEATH'S PETITION FOR POSTCONVICTION RELIEF.

The district court's order discusses eleven issues raised by Heath. These issues will be discussed together in this section of the Respondent's brief in the same order as they appear in the district court's order.

This Court reviews a district court's denial of a petition for postconviction relief to determine whether the court's findings of fact are clearly erroneous and whether its conclusions of law are correct. Hamilton v. State, 2010 MT 25, ¶ 7, 355 Mont. 133, 226 P.3d 588; Beach v. State, 2009 MT 398, ¶ 14, 353 Mont. 411, 220 P.3d 667 (citing Heath v. State, 2009 MT 7, ¶ 13, 348 Mont. 361, 202 P.3d 118). Here the record shows that the district court gave careful consideration to the

facts established at the evidentiary hearing and arrived at a detailed and correct legal conclusion with respect to Health's many claims. This Court should find no factual or legal error and should affirm the district court's denial of Heath's petition for postconviction relief.

In evaluating ineffective assistance of counsel claims, this Court applies the two-part test set out in Strickland v. Washington, 466 U.S. 668 (1984) and State v. Hendricks, 2003 MT 223, ¶ 6, 317 Mont. 177, 75 P.3d 1268. Heath must satisfy both prongs of the Strickland test in order to prevail on an ineffective assistance of counsel claim. Adams v. State, 2007 MT 35, ¶ 22, 336 Mont. 63, 153 P.3d 601.

The proper standard for evaluating defense counsel's performance is whether that performance was objectively reasonable. Whitlow v. State, 2008 MT 140, ¶ 12, 343 Mont. 90, 183 P.3d 861; Hendricks, ¶ 7. Under the first prong, Heath must show that Hudspeth's performance was deficient in that he must prove that "counsel's performance fell below an objective standard of reasonableness . . . under prevailing professional norms . . . considering all the circumstances." Strickland, 466 U.S. at 687-88; Hendricks, ¶ 6.

In order to eliminate distortion by using hindsight, judicial scrutiny of counsel's performance must be highly deferential. Strickland, 466 U.S. at 689. Courts should "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must

overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Id. (citation omitted). This Court has made similar statements:

> A defendant must overcome the presumption that under the circumstances the action which he challenges might be considered sound trial strategy. Counsel's trial tactics and strategic decisions not only are entitled to great deference when reviewed on a claim of ineffective assistance of counsel, but they cannot be the basis upon which to find ineffective assistance of counsel.

State v. Whitlow, 2001 MT 208, ¶ 17, 306 Mont. 339, 33 P.3d 877.

The deference this Court gives an attorney's conduct on appellate review is such that this Court rarely grants relief if there is **some evidence** that the attorney's decision was strategic. State v. Lamere, 2005 MT 118, ¶ 12, 327 Mont. 115, 112 P.3d 1005. Further, "'[c]laimed inadequacy of counsel must not be tested by a greater sophistication of appellate counsel, nor by that counsel's unrivaled opportunity to study the record at leisure and cite different tactics of perhaps doubtful efficacy.'" State v. Langford, 248 Mont. 420, 433, 813 P.2d 936, 946 (1991) (citation omitted). Counsel is presumed to have rendered adequate assistance. State v. Niederklopfer, 2000 MT 187, 300 Mont. 397, 6 P.3d 448.

Under the second prong, Heath must show that Hudspeth's deficient performance prejudiced him. This requires that counsel's errors were so serious as to deprive Heath of a fair trial, the result of which is unreliable. Strickland, 466 U.S. at 687. A defendant "must show that there is a reasonable probability that,

but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

A. Hudspeth's Adequate Communication to Heath Regarding the Possibility of a Guilty Verdict.

The district court found that Heath offered minimal support for his allegation that Hudspeth failed to communicate the possibility that he could be found guilty or that Hudspeth "guaranteed" an acquittal.

At the hearing, Heath testified that Hudspeth guaranteed that he would be acquitted because there was more evidence on his behalf. Heath testified that Hudspeth told him it could be proven that the victim of the sexual intercourse without consent was lying. (4/16/09 Tr. at 47-48.) Heath also claimed that Hudspeth never went over anything prior to trial. (4/16/09 Tr. at 83.)

In a letter dated August 16, 2002, Hudspeth indicates to the Office of Disciplinary Counsel (ODC) that the case against Heath was "winnable" but for the fact that Heath did the opposite of what had been discussed for the purposes of his testimony at trial; and the jury did not believe Heath. (D.C. Doc. 23C at 2.) Hudspeth indicated to ODC that most of the conversations he had with Heath were "inane and fruitless as he continually asked whether I thought he would be acquitted . . . ." (D.C. Doc. 23C at 1.)

Heath testified at the hearing that there were several meetings and a couple of phone calls between himself and Hudspeth where they discussed trial strategy.

(4/16/09 Tr. at 33 and 35.) In the letter to ODC, Hudspeth indicates that they spoke almost daily as Heath would call several times during any given day and that this communication continued even after Heath was sentenced and still in the county jail. (D.C. Doc. 23C at 1.)

The district court found Hudspeth's August 16, 2002 letter to ODC was eminently more believable and credible than Heath's testimony at the hearing. Judge McKittrick indicated that Heath's assertions were "bald and specious" and were made "all the more so" because Heath waived his Fifth Amendment right not to testify. (D.C. Doc. 13 at 5.)

Because of these factors, the district court properly determined that Heath failed to carry his burden of demonstrating by a preponderance of the evidence that Hudspeth's performance fell beneath an objectively reasonable standard of professional conduct and, thus, failed to carry his burden under the first prong of the Strickland test. Additionally, the district court properly determined that Health failed under the second prong of Strickland by concluding from the testimony and evidence that the outcome of the trial would not have been different had Hudspeth done more, especially since Heath did the opposite of what Hudspeth advised, as stated in his letter to ODC.

B. Hudspeth's Adequate Cross Examination of the Victim and Others Regarding Her Statements to Police

Heath claims that Hudspeth failed to impeach the victim with statements she had previously made to police regarding a previous incident between her and Heath. As the district court accurately points out, the transcript of that interview was never admitted at Heath's trial and the officer who conducted the interview did not testify at trial about the earlier arrest, and therefore, there was no evidence of this statement before the jury and it was not a proper subject for cross examination. In fact, the district court properly determined that it would not have been objectively reasonable professional conduct for Hudspeth to bring this issue to the jury's attention.

Heath also claims that Hudspeth failed to impeach the victim regarding her statement to police that Heath was no longer her boyfriend. The district court extensively cited the trial transcript which shows Hudspeth's thorough questioning of the victim in an attempt to impeach her regarding her statement to police about her relationship with Heath. (D.C. Doc. 31 at 6-10.) The district court also found that Hudspeth attempted to undermine the victim's credibility regarding her relationship with Heath during the cross examination of Officer Bellusci. (D.C. Doc. 31 at 11.)

Heath claims that Hudspeth should have called the victim's nine year old daughter as a witness on this issue. Heath provides only his self-serving testimony to support this claim; there is no affidavit, record or any evidence in support of the

claim. The court notes that in Eiler v. Montana, 254 Mont. 39, 833 P.2d 1124 (1992), this Court required the presentation of affidavits, records or other evidence to establish the testimony proposed, and that none of that was present here. The court also notes that in State v. Wright, 2001 MT 282, ¶ 9, 307 Mont. 349, 42 P.3d 753, this Court required that claims of ineffective assistance of counsel must be grounded in facts, not merely conclusory allegations.

Finally, Heath claims that Hudspeth failed to properly cross-examine the victim on her statement to police that the struggle between her and Heath lasted for at least an hour. The district court again cites the trial transcript that shows the thorough questioning by Hudspeth of the victim, Officer Bellusci, Officer Palmer, and Heath. (D.C. Doc. 31 at 11-12.) The court properly notes that Heath offers only conclusory assumptions, pure speculation, and unconvincing factual evidence to support this claim.

On this issue, the district court properly determined that Hudspeth's actions were objectively reasonable conduct and determined that Heath had failed in his burden under the first prong of the Strickland test. Further, the district court never reached the second prong of Strickland on this issue, properly determining instead that Heath's arguments failed to overcome the strong presumption that Hudspeth rendered adequate assistance.

C. Hudspeth's Proper Decision Not to Call Certain Witnesses

Heath claims that Hudspeth failed to call four additional witnesses that Heath alone contended, without affidavits, records or other evidence establishing their testimony, would have benefited him at trial.

Lori Heath and Patricia Erickson. Lori is Heath's ex-wife and, according to him, would have testified that when he drinks he has an anger problem; that he never physically attacked her; that he never forced her to have sex; and that he was not "really into sex." (4/16/09 Tr. at 66, 76-77.) Patricia is Heath's ex-girlfriend and, according to him, would have testified that he was neither violent nor sexually deviant. (D.C. Doc. 1 at 3.) However, as the district court accurately points out, neither Lori nor Patricia have expertise regarding sexual deviance and their testimony would have likely opened the door to negative character evidence potentially including his prior conviction for stalking, violation of a temporary restraining order, his temper and anger problems, prior fights, etc. (D.C. Doc. 31 at 38.) The district court accurately notes that "such evidence would, more likely than not, negatively affect Mr. Heath's case." (D.C. Doc 31 at 38.) "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." Strickland, 466 U.S. at 691.

Rhonda Oshio. Rhonda, who helped Heath move and store his belongings before he met the victim, would have allegedly testified that Heath had more than one pair of jeans, supposedly contradicting statements the victim made to police that the menstrual blood on his sheets was old because Heath only owned one pair of jeans and never washed his sheets and clothes. As the district court accurately states, this evidence had little relevance to the issue of the consensual nature of the incident before the jury and any attempt by Hudspeth to impeach the victim on this front would have been fruitless.

Mike Manning. Mike, according to Heath, would have testified that Heath had been laying carpet for him prior to the incident and that the rug burns on Heath's knees were caused from that activity. Judge McKittrick, who was the trial judge in this case, indicates in his order that at trial Heath admitted that he told the police that his knees were injured because he had "sex on the floor a lot" and did not offer the carpet laying explanation to them while being interviewed on tape. Heath, however, told the jury that his knees were injured because he laid carpet for a living. (D.C. Doc. 31 at 38-39.)

Heath never called any of these witnesses at the hearing and did not provide the district court with any affidavits, records or other evidence that would have sufficiently established their testimony. Eiler, 254 Mont. at 42-43.

Kory Larsen (Larsen) testified at the hearing that he prosecuted approximately 30 cases where Hudspeth was the defense attorney and he had also been the prosecutor when Hudspeth was acting as a substitute municipal judge. (4/16/09 Tr. at 90-91.) Larsen characterized Hudspeth as "one of the best trial attorneys I practiced against." Larsen indicated that when Hudspeth was taking a case to trial, he had a reason and that he was very effective in the courtroom. (4/16/09 Tr. at 91.) Larsen testified that Hudspeth's normal trial practice was to find a weak point in the State's case and focus on that point, avoiding the "shotgun" approach to trial practice that he felt distracted juries. (4/16/09 Tr. at 92.) Larsen indicated that Hudspeth would not call witnesses that were on his witness list and in later discussions would indicate why he did not call a particular witness. Larsen even related an incident when Hudspeth was acting as a substitute municipal judge with a pro se defendant and stopped him from calling a witness whom Hudspeth claimed would have damaged the defendant's case if the witness had testified. (4/16/09 Tr. at 93-94.)

The district court properly determined the fact that Hudspeth did not call any of these witnesses was objectively reasonable conduct and determined that Heath had failed in his burden under the first prong of the Strickland test. Further, as to all of the witnesses, with the exception of Mike Manning, the district court never reached the second prong of Strickland on this issue, properly determining instead

that Heath's arguments failed to overcome the strong presumption that Hudspeth rendered adequate assistance. The district court also properly held that the testimony of Mike Manning would not have undermined the confidence in the outcome of the trial and, thus, Heath failed to sustain the weighty burden of proof necessary to establish ineffective assistance of counsel under the second prong of the Strickland test.

D. Hudspeth Allowed Heath the Opportunity to Meaningfully Assist in His Own Defense.

Heath claims that Hudspeth failed to use witnesses and information that Heath provided and that Hudspeth routinely refused to answer Heath's telephone calls. Heath also claims that Hudspeth failed to provide Heath with color photographs of the scene that prevented Heath from pointing out to Hudspeth how the scene would have appeared different if there had actually been an hour-long struggle, and that he never received a copy of the victim's statement so he could point out inconstancies. Heath claims this shows that Hudspeth failed to allow Heath the opportunity to meaningfully assist in his own defense.

The district court asserts that in the assessment of the credibility of Heath both at the hearing and at trial that Heath is "not particularly well-equipped to assist in his own defense, especially with regard to determining whether certain evidence is appropriate or damaging to present on his own behalf." (D.C. Doc. 31 at 16.) Heath never called any of these witnesses at the hearing and did not

provide the district court with any affidavits, records or other evidence that would have sufficiently established their testimony. Eiler, 254 Mont. at 42-43. The district court properly determined that the fact that Hudspeth did not call any of these witnesses was objectively reasonable conduct and determined that Heath had failed in his burden under the first prong of the Strickland test.

At the hearing and in his Affidavit, Heath claims that Hudspeth routinely refused to take his calls and rarely visited him in jail, thereby not allowing him to assist in his own defense. (D.C. Doc. 1A at ¶ 9; 4/16/09 Tr. at 33-35.) However, in Hudspeth's letter to the ODC, he states that he was in daily contact with Heath but that the conversations were often inane and fruitless. (D.C. Doc. 23C at 1.) The district court did not find these statements in conflict, but based on Heath's "dubious assertions" regarding witnesses, evidence, and the like, the court found the content of Hudspeth's letter to be infinitely more credible. (D.C. Doc. 31 at 16.) The district court properly determined that Hudspeth may not have taken every call and limited his visits, but that his conduct was objectively reasonable, and determined that Heath had failed in his burden under the first prong of the Strickland test.

The district court correctly determined that Heath presented no affidavit, record, or other evidence that adequately supports his claim that the scene in the house would have appeared dramatically different than it did in the police photos. The court found that color photographs would not have significantly altered

Heath's ability to comment on the condition of the house, particularly since Heath was present and lived in the house on the night in question. Based on the photographs that were attached to his Petition, the court found that the space was not orderly and the jury could find "ample evidence of a one-hour struggle from the pictures." (D.C. Docs. 31 at 17; 1F.) Thus, the court properly determined Hudspeth's actions were objectively reasonable conduct and that Heath had failed in his burden under the first prong of the Strickland test. Further, the district court properly held that Health having color photographs would not have sufficiently undermined the outcome of the trial and, thus, Heath failed to sustain the weighty burden of proof necessary to establish ineffective assistance of counsel under the second prong of the Strickland test on this issue.

With regard to Heath's claim that he never received a copy of the victim's statement to police, and with that he could have pointed out discrepancies to Hudspeth, the district court properly determined that it did not rise to the level of ineffective assistance. As the court points out, Heath was familiar enough with the victim's statement that he provided a list of witnesses that he believed could impeach what she had said to the police. (D.C. Docs. 31 at 17; 40; 4/16/09 Tr. at 65-68.) The district court found that Heath failed to show there was a reasonable probability that had the transcripts been provided the outcome would have been different; thus, the court properly determined that Heath failed to sustain the

weighty burden of proof necessary to establish ineffective assistance of counsel under the second prong of the Strickland test on this issue.

E. Hudspeth's Proper Decision Not to Call Dr. Harper

Heath claims that Dr. Harper, the emergency room physician that examined the victim the night of the incident, would have clearly refuted the victim's statements and testimony. However, the district court correctly points out that Dr. Harper's report appears to closely track the victim's reports of her injuries.

The district court sets out an extensive analysis regarding the injuries received by the victim, her statements and testimony and the report of Dr. Harper in its order. (D.C. Doc 31 at 17-22.)

At the hearing, Avery testified that he could not think of a tactical reason not to call Dr. Harper because the report indicated that Dr. Harper had not found evidence of nonconsensual sex. (4/16/09 Tr. at 9, 16.) The fact that Avery would have called Dr. Harper is not enough to prove an ineffective assistance of counsel claim. In State v. Grixti, 2005 MT 296, ¶ 28, 329 Mont. 330, 124 P.3d 177, this Court held that the fact that some other lawyer would have done differently is not enough to establish ineffective assistance of counsel. Additionally, the district court accurately indicates that Dr. Harper merely reported the incident, documented the results of the physical exam, and gave the following impression: "ACUTE ALLEGED SEXUAL ASSAULT." (D.C. Docs. 31 at 18; 1C.)

Heath provided no expert testimony at the hearing interpreting Dr. Harper's report and no affidavits, records, or any other evidence in support of his claim that Dr. Harper's testimony would have established that there was no evidence of nonconsensual sex from the medical record or that his testimony would have undermined the victim's credibility. The court correctly shows that even though there was no evidence provided why Hudspeth did not call Dr. Harper, Hudspeth did question the victim about the extent of her injuries and the inconsistency in her stories about the incident. (D.C. Doc. 31 at 19-20.)

Avery went on to testify that Dr. Harper's report spoke of lack of bruises and scratches and "whatnot." (4/16/09 Tr. at 31.) However, the district court found no such indication; in fact, Dr. Harper reports multiple abrasions, at least one laceration, and some mild tenderness around the victim's ribs. (D.C. Doc. 1C.) Even Heath's own testimony indicates that he had a very physical encounter with the victim and offers no evidence that more serious injuries should have occurred or the injuries would have been different than was described at trial by the victim or as seen by the police photographs of her injuries.

The district court points out some inconsistencies between what Dr. Harper wrote in his report and the evidence and testimony at trial, but believed that they were minimal at best and had Dr. Harper testified it would not have changed the outcome of the trial. The court indicates that the only proof offered that the second

prong of the Strickland test had been met was Heath's answer to this question at the hearing: "Do you feel that the fact Dr. Harper did not testify at your trial hurt your case?" Heath answered: "Definitely." (4/16/09 Tr. at 51.) As stated previously, Judge McKittrick's assessment of Heath's testimony at trial and at the hearing demonstrated that he was not adequately qualified to assess how evidence plays out in front of a jury, comment on trial strategy, or determine that the outcome of the trial would likely be different, and did not sustain his burden under the second prong of the Strickland test.

F. Hudspeth's Proper Decision Not to Call Dr. Scolatti

Heath claims that Dr. Scolatti, who was hired by the defense to conduct an evaluation on Heath, should have been called to testify in his defense as to the list of "positive factors" listed in Dr. Scolatti's letter to Eric Olson, the Chief Public Defender in Cascade County at the time of the incident. (D.C. Doc. 1E.) Heath continues to ignore that Dr. Scolatti also listed several "negative factors" and would have presented both if he had testified. His letter goes on to state that if he were "asked the million dollar questions [sic], 'Is Mr. Heath capable of this crime?' I would have to say 'Yes.'" Dr. Scolatti goes on to say that he does not believe that Heath "raped" the victim as she reported, but that based on Heath's history and Dr. Scolatti's assessment, that is was "very unlikely" that he did not "rape" her. (D.C. Doc. 1E at 2.) While this statement goes to the ultimate question posed to the

jury and, as the district court points out, would not have been admissible at trial, it goes a long way in determining the mindset of Dr. Scolatti and a sound tactical reason for not having him testify. The district court found that Heath presented no persuasive evidence to contradict Dr. Scolatti's opinion and has not proven by a preponderance of the evidence that, but for the fact that Hudspeth did not call him to testify, there is a reasonable probability that the outcome of Heath's trial would have been different. The district court correctly determined that Heath failed to sustain his burden under the second prong of the Strickland test.

G. Hudspeth's Proper Decision Not to Do a Reenactment.

Heath testified at the hearing that Hudspeth told him that he was going to conduct a reenactment of the crime. (4/16/09 Tr. at 47.) Heath testified that he thought a reenactment would have "definitely" been helpful because it would show that "it could never have happened. It's just not possible, not even in a million years. I mean, granted, I believe that rapes happen in small places and things could happen but not in the way she described it. It just couldn't happen." (4/16/09 Tr. at 49.) Heath at the hearing testified that even Dr. Scolatti believed that the crime could not have occurred as the victim reported. Heath referred to a statement made by Dr. Scolatti in his letter that indicated that the victim had claimed "some factual impossibilities." In particular, Dr. Scolatti was focusing on her claim that she had "squeezed his balls as hard as I could when he was trying to perform oral sex on

me." (D.C Doc. 1E at 1.) The district court determined that Heath believed that this was an appropriate scenario for reenactment.

At the hearing, Avery testified regarding a conversation he had with Hudspeth regarding the reenactment. Avery testified that he was troubled that Hudspeth had allegedly promised Heath that he would do a reenactment and did not follow through, or even prepare to do one. (4/16/09 Tr. at 13, 20.) However, Avery admitted that reenactments can be awkward and could have actually helped the jury visualize exactly how Heath committed the crime. (4/16/09 Tr. at 21.)

Avery also testified that the victim's description of the incident "just didn't seem very realistic." He testified that he believed that Hudspeth should have shown a video of the kitchen so the jury could see how small it was, while conceding that "rapes" are committed in the back seats of cars. (4/16/09 Tr. at 23.) The district court found that the photographs that were entered into evidence at trial as State's Exs. 2 and 3, were adequate to demonstrate the size of the kitchen.

The district court properly found that Heath failed to sustain his burden that there was a reasonable probability the trial would have had a different outcome had Hudspeth done a reenactment under the second prong of the Strickland test.

H. Hudspeth Adequately Informed Heath of Potential Conflicts of Interest.

Heath claims that Hudspeth had two conflicts of interest and he was not informed of these conflicts, and because of the nondisclosure, Hudspeth was

ineffective. In his affidavit, Heath alleges that he was not aware that Hudspeth had previously represented the victim's brother. He also alleges that Hudspeth failed to inform him that he represented Ramon Rowkowski (Rowkowski), who was charged with murdering Avery Jones (Jones), a potential impeachment witness.

As Judge McKittrick recounted several times in his order, Heath's credibility fell well below Hudspeth's credibility as evidenced by his letter to the ODC, and this is no exception. In the letter, Hudspeth tells ODC that he informed Heath in their first meeting that he had represented the victim's brother sometime between 1992 and 1994. He explained to Heath that the case was settled by a plea agreement and that he had never met the victim, but knew of her, and that Heath had no problem with Hudspeth's representation of him. (D.C. Doc. 23B.)

The district court accurately points out that even if this exchange had not occurred, Heath has not demonstrated that the outcome of the trial would have been different under the second prong of the Strickland test.

Heath, in his affidavit, indicates that Jones was a drug dealer that Hudspeth had identified as a potential impeachment witness against the victim. (D.C. Doc. 1A at 6.) Heath testified at the hearing that Jones had sold drugs to the victim and that he could have testified that he had seen the victim get into a fight with her live-in boyfriends who were three times the size of Heath. (4/16/09 Tr. at 37.) Because Jones died prior to trial, he could not have testified. Nonetheless, the

district court properly found that the jury was unlikely to find him a credible witness or accord much weight to his testimony. (D.C. Doc. 31 at 29.) Heath again presents no affidavit, record or other evidence to support his self-serving claim of what Jones' testimony would have been or that Hudspeth's representation of the man alleged to have killed Jones was directly adverse or would have materially limited his responsibilities to Heath. (D.C. Doc. 31 at 29.)

The district court properly found that Heath has not demonstrated that the outcome of the trial would have been different under the second prong of the Strickland test.

I. Heath's Claim of Improper Restitution

This Court has previously vacated part of the March 29, 2002 sentencing order that imposed restitution in the amount of $1,295, pursuant to Mont. Code Ann. § 46-21-101, and ordered that the money be returned to Heath. The district court properly found that because of this action by this Court, the question of Hudspeth's and Chad Wright's failure to object to the imposition of restitution as ineffective assistance of counsel at sentencing and on appeal is moot.

J. Heath's Claim That Hudspeth Failed to Call Heath's Father as a Witness Is Procedurally Barred.

At the hearing, Heath testified that his father told him about statements allegedly made by the victim that she threatened to have Heath thrown in prison and that he was never called as a witness at his trial. (4/16/09 Tr. at 52-54.) He

raises this issue in his post-evidentiary hearing brief. (D.C. Doc 25 at 10.) However, Heath never raised this issue in his original petition or affidavit and never filed an amendment to that original petition.

The district court properly holds that because this issue was not raised prior to the hearing and posthearing briefing, it is procedurally barred. The district court properly cites Mont. Code Ann. § 46-21-105 as requiring that all grounds for relief must be raised in the original petition or amended original petition. Further, the district court properly found that any ineffective assistance of counsel claims that are not asserted in either the original petition or amended original petition are procedurally barred and a petitioner may not raise new claims at the evidentiary hearing. Stevens v. State, 2007 MT 137, ¶¶ 8-12, 337 Mont. 400, 162 P.3d 82.

Heath failed to raise the issue of his father's potential testimony regarding the alleged threats of the victim in his original petition or in an amended original petition. Based on this, the district court correctly held that Heath failed to meet the stringent statutory pleading requirements and is, therefore, procedurally barred from raising this issue.

K. Hudspeth's Proper Investigation of Physical Evidence

Heath claims that Hudspeth failed to properly investigate State's Ex. 5, a piece of cloth that was referred to as a "gag," with a small clump of hair wrapped inside the cloth, that the victim testified at trial was hers. At trial, Hudspeth

objected to the hair in State's Ex. 5 for lack of foundation. He argued that the hair should be marked as a separate exhibit. Hudspeth did not object to the cloth as a separate exhibit.

Heath first raised this issue in his June 18, 2007 reply to the State's response to his original petition. He again raises it at the evidentiary hearing. Heath never raised this issue in his original petition or affidavit. The district court again properly cites Mont. Code Ann. § 46-21-105, as requiring that all grounds for relief must be raised in the original petition or amended original petition. Further, the district court properly found that any ineffective assistance of counsel claims that are not asserted in either the original petition or amended original petition are procedurally barred and a petitioner may not raise new claims at the evidentiary hearing. Stevens, ¶¶ 8-12.

Heath did not raise this issue in his original petition and, as such, the district court correctly held that Heath failed to meet the stringent statutory pleading requirements. The district court goes on to note that Heath apparently decided to raise this issue in his June 18, 2007 reply brief without amending the original petition. Further, that even though the court did not set a deadline for filing an amended petition, Heath did not raise this issue 30 days prior to the evidentiary hearing, which pursuant to Mont. Code Ann. § 41-21-105(1)(a), is the last

opportunity to file amendments. Therefore, the district court correctly concluded that this issue is also procedurally barred.

The district court goes on to state that should this Court determine that Avery preserved this issue by raising it in the reply brief, and concludes Hudspeth did fail to inspect the evidence, the error was harmless and the second prong of the Strickland test has not been met.

Heath testified at the hearing that it seemed to him the hair in the cloth was a surprise to Hudspeth, and seems to be claiming it should have been objected to as unfair surprise. The district court seemingly remembers the exchange at trial differently. In his order, Judge McKittrick indicates that Hudspeth's objection centered around foundation and wanting the cloth and the hair marked as separate exhibits, since the cloth had already been admitted into evidence. (D.C. Doc. 31 at 48-50.) The district court properly analyzed that had Hudspeth objected and gotten the hair suppressed, the "gag" would still have been in evidence for the jury to inspect. The district court properly concluded that the hair's admission as evidence, although it could be interpreted as somewhat prejudicial, did not rise to the level of having a reasonable probability of altering the outcome of the trial.

Heath has failed to overcome the strong presumption, as required, that Hudspeth was making reasonable tactical and strategic decisions and, as a result, failed to show Hudspeth's performance was deficient.

Finally, Heath is arguing that this Court should grant him a new trial. However, Heath cites no legal authority for this action. Montana Rule of Appellate Procedure 12(1)(f) provides that the argument section of an appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefore, with citations to the authorities, statutes, and pages of the record relied on." This Court has repeatedly held that it will not consider unsupported issues or arguments and is under no obligation to locate authorities or formulate arguments for a party in support of positions taken on appeal. State v. Ochadleus, 2005 MT 88, ¶¶ 31-32, 326 Mont. 441, 110 P.3d 448, citing State v. Rodarte, 2002 MT 317, ¶ 15, 313 Mont. 131, 60 P.3d 983. For violations of the appellate rules, this Court refuses to entertain issues or address arguments on the unbriefed or inadequately briefed claims. See, e.g., Rieman v. Anderson, 282 Mont. 139, 145, 935 P.2d 1122, 1126-27 (1997) (because appellants cited no legal authority for their argument, the court on appeal declined to hear their argument). Heath has waived this issue.

II. HEATH HAS NOT SHOWN THAT HIS POSTCONVICTION RELIEF ATTORNEYS PROVIDED INEFFECTIVE ASSISTANCE.

Heath claims that Avery and Stephens, his postconviction attorneys, failed to bring to the district court sufficient evidence that would have given the court

reason to grant his original petition for postconviction relief and, thus, were ineffective. This argument is without merit and not supported by the law.

Heath argues that it was his responsibility to bring to the district court sufficient evidence of his claims in his original petition; however, the district court held on many of the issues raised at the hearing that Heath failed in this regard. Heath cannot now put the blame on his postconviction attorneys.

Heath has no constitutional right to counsel in a postconviction proceeding and, therefore, no ineffective assistance of counsel claim can be raised regarding Avery's and Stephens' performances in his postconviction proceedings. Pennsylvania v. Finley, 481 U.S. 551 (1987); In re Martin, 240 Mont. 419, 787 P.2d 746 (1989); Coleman v. Thompson, 501 U.S. 722 (1991).

Further, Heath argues that he should be granted new counsel and a new evidentiary hearing, but cites no legal authority for this argument. As stated above in regard to the issue of this Court granting Heath a new trial, Heath has also waived this issue.

CONCLUSION

The State requests that this Court affirm the district court's decision denying Heath postconviction relief and a new trial. The State also requests that this Court deny Heath's request for new postconviction counsel and a new hearing.

Respectfully submitted this ____ day of May, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that I caused a true and accurate copy of the foregoing Brief of Appellee to be mailed to:

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(Hand-delivered into the wire basket located in the reception area in the Attorney General's Office, 215 North Sanders, Helena, Montana 59620.)

Mr. John Parker
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DATED:_____ _____

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 11 of the Montana Rules of Appellate Procedure, I certify that this principal brief is printed with a proportionately spaced Times New Roman text typeface of 14 points; is double-spaced except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word for Windows is not more than 10,000 words, excluding certificate of service and certificate of compliance.

_____

DEBORAH F. BUTLER